

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-2064

To be argued by
KENNETH E. DEMARIO

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X

FREDERIC D. JENNINGS,

Petitioner-Appellant,

-against-

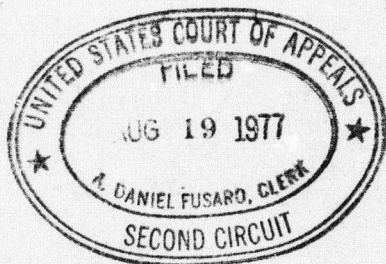
J. LELAND CASSCLES, Superintendent
of Great Meadow Correctional Facility,
Comstock, New York,

Respondent-Appellee.

DOCKET NUMBER
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BRIEF FOR PETITIONER-APPELLANT



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DATED: New York, New York
August 19, 1977

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QUESTION PRESENTED

WHETHER APPELLANT WAS DENIED HIS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS WHEN HIS CONFESSION, INCURABLY TAINTED BY DIRECT POLICE EXPLOITATION OF PRIOR STATEMENTS TAKEN IN VIOLATION OF HIS RIGHT AGAINST SELF-INCRIMINATION, WAS ADMITTED AGAINST HIM AT TRIAL?

STATEMENT OF THE CASE

PRIOR PROCEEDINGS

Appellant Frederick Jennings was convicted of murder after a jury trial in the County Court, Suffolk County, New York, and sentenced on August 5, 1971, to a term of imprisonment of 25 years to life to run concurrently with two fifteen year indeterminate sentences. His conviction was affirmed by the Appellate Division, Second Department (40 A.D.2d 357 (1973)) and the New York Court of Appeals (33 N.Y.2d 880 (1973)).

Appellant, pro se, then petitioned the United States District Court for the Eastern District of New York for a writ of habeas corpus claiming that his confession had been admitted into evidence at his state trial in violation of his rights under the Fifth and Fourteenth Amendments to the United States Constitution, an issue raised and decided against him in the state courts. His application was denied by the District Court (Costantino, J.) in a decision and order dated August 14, 1974.

A subsequent petition, in which Jennings was represented by counsel, was filed, also in the Eastern District. The District Court considered the application on the merits and again denied the petition in a memorandum and order dated November 8, 1976 (reported at 424 F.Supp. 280). On March 25, 1977, Judge Costantino granted a certificate of probable

cause and the instant appeal followed.

ISSUE PRESENTED

The single claim on this appeal is that Jennings' confession was improperly admitted at his state court trial in violation of the Fifth and Fourteenth Amendments.

STATEMENT OF FACTS

At appellant Jennings' Suffolk County trial it was established that Mary Eloise Carman, a 14 year-old girl, had disappeared on the evening of June 4, 1970 (45-46).* On August 21, 1970, a body, later identified as Mary Eloise Carman, was found in a wooded area near her home by her father (46-50).

All of the evidence at trial, aside from appellant's confession was circumstantial evidence tending to establish the identity of the body and to establish that Mary Carman's death was a homicide. Jennings' oral confession made to Detective Edward Halverson was the only evidence inculcating him. Thus, the facts as established at the Huntley hearing and the conclusions of law drawn therefrom are the crux of the instant appeal as Jennings would not have been convicted without use of his confession at trial.

THE HUNTLEY HEARING

Detective Halverson, the chief witness for the prosecution at trial, was the only witness at the Huntley hearing.

* Numerals refer to page numbers of the Suffolk County trial transcript, Appellant's Exhibit 1 in the Record on Appeal.

On August 21, after discovery of the body, Detective Halverson was assigned to investigate the circumstances surrounding the death (205-207). Between August 21 and August 25, he spoke to a number of people who were possible suspects in the case (209). Having determined that Jennings lived in the vicinity and was in custody on rape charges, Halverson called the Suffolk County Jail where Jennings was being held and asked to speak with him (208-209).

After the requisite permission slips had been obtained, Halverson was notified, and on August 26 at approximately 10:40 a.m. he and his partner, Detective Dean, met and spoke with Jennings for the first time (208). They told Jennings that they were detectives from the Homicide Squad, investigating the murder and possible rape of Mary Eloise Carman (210). They pointed out similarities between the charges pending against him and the circumstances surrounding the death of Mary Carman (211, 252). They further told him that because of these similarities and the proximity of his home to that of the deceased and the scene of the crime, he was naturally placed in the category of a suspect (252). The detectives did not, however, advise Jennings of any of his rights under Miranda at any time on August 26 (252).

Halverson and Dean interrogated Jennings from 10:40 a.m. until 11:30 a.m. and after a break for lunch, from 1:05 p.m. to approximately 4:30 p.m. The morning questioning focused on Jennings' sexual problems as evidenced by the two prior arrests and Halverson's expressed belief that Jennings was

in fact responsible for the crime alleged in at least one of the rape cases pending against him (211, 253). Halverson confronted Jennings with "the fact that he would drag a girl into the woods and take their [sic] clothes off and commit an act of forcible intercourse on them" (254). During the morning session, Halverson did not discuss Mary Carman's death (212).

During the afternoon session, Jennings revealed that he had information concerning Mary Carman's death (212). He indicated that he had seen the body and accurately described its location (212-213). He explained that "a friend from the city" strangled the girl and had taken Jennings to view the body about a week after the incident (214, 216-217).

He indicated that the friend had visited Jennings' home in Suffolk County on the evening of Mary Carman's disappearance. Jennings had gone to visit his girlfriend at about 9:30 p.m., leaving the friend behind (215-216), but met him again at about 11:30 p.m. in front of the girl friend's house (216). Jennings and his friend walked to their car and Jennings drove his friend back to the city (216). A week later the friend returned to Jennings' home in Suffolk County and showed him the body (217). Halverson expressed incredulity that Jennings would have made no further inquiry (217, 218), but Jennings insisted that he had no other conversation concerning the body with the friend. Halverson was unable to induce Jennings to reveal his friend's name and could elicit only a general description. The interrogation was concluded at approximately 4:30 p.m. (219).

Armed with the information extracted from Jennings, Halverson set about checking into the story. He went first to Jennings' home, where he interviewed his mother (220). He determined that no one in the family knew of any friend who had visited from the city (221).

Later that same evening, Halverson went to speak to Annie Carter, Jennings' girlfriend (221). She said that Jennings had not been with her on the night of the Mary Carman disappearance and that she knew nothing of his friend from the city (221).

The next morning, August 27, Halverson returned to Suffolk County Jail, convinced that Jennings had lied, and believing him to be "a very good suspect in the murder of Mary Eloise Carman" (223). This belief was based on the previous night's investigation and on the personal knowledge of the location of the body demonstrated by Jennings in the previous day's questioning (223).

Halverson met Jennings at approximately 10:40 a.m., at which time he advised him of his Miranda rights (226). Jennings agreed to speak without a lawyer, stating, "My friend did it and I'll speak to you about it. I've got nothing to hide" (226).

Halverson asked Jennings to go over the story he had told the day before, again telling him that he and his partner found it very difficult to believe that Jennings would not have inquired further of his friend concerning the details of the killing (228).

At this point, Jennings acknowledged that he knew everything that had happened. He proceeded to explain how his friend had watched the deceased walking along the street, followed her, grabbed her around the neck and dragged her into the woods (229-230). Finding that she had jewelry of little value, his friend had raped and strangled her (230-231). Afterwards his friend had come to Jennings' girlfriend's house, they had walked to the car and his friend had dropped him off before driving back to the city (232, 233). Jennings reiterated his previous day's statement that his friend had come out from the city a week after the incident and shown him the body (234).

Halverson pointed out discrepancies in the story and informed Jennings that Annie Carter had unequivocally denied that Jennings was with her on the night of the victim's disappearance, which coincided with the concert at Wyandanch Junior High School, an event of some moment in the town (235). The detective quoted Annie Carter as telling him distinctly that Jennings had no friends, but "hung out mostly by himself" (235).

When Jennings became agitated and began to raise his voice, Halverson admonished him to calm down, simultaneously explaining that his story was unbelievable. For approximately 15 minutes, Halverson spoke to appellant, reiterating several times that he did not believe the friend existed, but believed instead that Jennings had killed Mary Carman (236). Finally,

Jennings capitulated, admitting that he had done what he had attributed to the friend (236, 237).^{*} The interrogation concluded at about noon (238). No stenographic transcript or signed statement resulted from this interrogation.

On cross-examination at the hearing, Halverson acknowledged that he knew that Jennings was probably represented by counsel on the two charges pending against him, but made no effort to contact his attorney before questioning him on either day (250, 251).

DECISIONS BELOW

Defense counsel in a pre-trial motion to suppress Jennings' confession argued that since appellant was not advised of his rights until the second day of interrogation, his confession was the "fruit of the poisoned vine" and, therefore, inadmissible (337).

The trial court, (Hon. Ernest L. Signorelli), found as fact that appellant was in custody within the meaning of the Miranda decision on August 26 and 27 and that no warnings had been given him on the 26th (340, 341). He accepted Detective Halverson's testimony as to what Jennings had recounted on each day (340-343). The court found that appellant had been properly advised of his rights on August 27 prior to interrogation (341). The court ruled that the statements of August 26 were inadmissible since the Miranda warnings had not been given, but that the oral statements of August 27 were admissible on the theory that Jennings had been properly advised of his

^{*} Head down during Halverson's entreaties to admit that it was he and not the fictitious friend who had committed the crime, Jennings finally said, "Yeah, I did it." He declined to discuss the case any further after this admission. (236).

rights before making these statements and voluntarily waived these rights (344, 345). The court did not address the legal significance of the causal relationship between the inadmissible statements of the 26th and the confession procured on the 27th.

The Appellate Division, Second Department affirmed appellant's conviction, finding that the confession was not "involuntary by reason of coercion, deception or other pernicious conduct on the part of the police" 40 A.D.2d at 363. The

court rejected appellant's framing of the issue as whether "the falsity of the first statement made without Miranda warnings led to the second made following Miranda warnings" 40 A.D.2d at 363, and therefore, refused to consider the taint of the first day's interrogation and its effect on the confession procured on the second day. The Court of Appeals affirmed on the opinion of the Appellate Division.

In the memorandum and order here appealed from, Judge Costantino questioned the applicability of the "fruit of the poisonous tree" doctrine to a Fifth Amendment violation, but held that even if applicable, "The petitioner's voluntary repetition of his first day's statements, after being given the Miranda warnings on the second day, constituted an intervening act of free will sufficient to purge the primary taint so as to render the confession admissible." (424 F.Supp. at 285).

ARGUMENT

APPELLANT WAS DENIED HIS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS WHEN HIS CONFESSION, INCURABLY TAINTED BY DIRECT POLICE EXPLOITATION OF PRIOR STATEMENTS TAKEN IN VIOLATION OF HIS RIGHT AGAINST SELF-INCRIMINATION, WAS ADMITTED AGAINST HIM AT TRIAL.

INTRODUCTION

On August 26, 1970, appellant Frederick Jennings was incarcerated in the Suffolk County Jail, pending disposition of two outstanding rape charges. On that date, in the course of a homicide investigation, Detective Edward Halverson and his partner interrogated Jennings without any of the warnings to protect his right against self-incrimination, mandated by Miranda v. Arizona, 384 U.S. 436 (1966). Since Jennings was obviously in custody, see Mathis v. United States, 391 U.S. 1 (1968), the state courts and the District Court properly found that his rights had been violated, and held inadmissible all statements made on August 26.

Detective Halverson's undisputed testimony demonstrates that he directly exploited Jennings' unwarned statements by conducting investigations which uncovered information discrediting Jennings' story. Armed with this information, Halverson extracted a confession, within 20 hours of the initial illegal questioning, by confronting Jennings with the products of his investigation, after reciting the warnings required by Miranda and inducing Jennings to repeat his account of the previous day. Thus, there was a clear causal relationship

between the concededly inadmissible admission of August 26 and the confession of August 27. Therefore, the only question to be decided by this Court is whether the taint of that first day's interrogation was purged by anything that occurred in the brief, over-night interval before Jennings four-word confession on August 27.

The District Court held that the "petitioner's voluntary repetition of his first day's statements, after being given the Miranda warnings on the second day, constituted an intervening act of free will sufficient to purge the primary taint so as to render the confession admissible." Jennings v. Casscles, 424 F.Supp. 280, 285 (E.D.N.Y. 1976). In holding that the Miranda warnings per se could purge the initial taint, the District Court committed clear error. Brown v. Illinois, 422 U.S. 590 (1975). The appropriate standard requires weighing a number of articulable factors, which the District Court failed to consider. A proper consideration of these factors, outlined below, compels the conclusion that the taint of the initial illegal interrogation and statement was not purged, but rather directly infected the confession, rendering it inadmissible.

Over the years, courts have employed differing terminology in labeling the test to be applied in determining the admissibility of evidence derived from a primary illegality.¹

1. Compare Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); Nardone v. United States, 308 U.S. 338 (1939); Wong Sun v. United States, 371 U.S. 471 (1963); with United States v. Bayer, 331 U.S. 532 (1947); Westover v. United States, 384 U.S. 436, 496-497 (1966).

Though the labels are different, the actual factors employed are remarkably the same. Two recent decisions of the Supreme Court set forth the important factors to be considered in determining the applicability of the exclusionary rule to derivative evidence.

MICHIGAN V. TUCKER, BROWN V. ILLINOIS AND APPLICABLE CRITERIA

In Michigan v. Tucker, 417 U.S. 433 (1974), the Supreme Court was urged to resolve "the broad question of whether evidence derived from statements taken in violation of the Miranda rules must be excluded regardless of when the interrogation took place" 417 U.S. at 447. The Court declined to do so, holding instead that the testimony of a witness, uncovered as a result of an interrogation pre-dating the decision in Miranda, need not be suppressed where the police had acted in good faith in conducting questioning in accordance with the law as it then existed. The Court, however, specifically noted that application of the exclusionary rule to derivative evidence would be warranted in order to deter evasion of the constitutional guarantee in a more appropriate Fifth Amendment case. 417 U.S. at 446-447.

Subsequently in Brown v. Illinois, 422 U.S. 590 (1975), the Supreme Court reaffirmed the viability of Wong Sun v. United States, 371 U.S. 471 (1963), and its "fruit of the poisonous tree" doctrine as it applied to a Fourth Amendment violation, where the fruit of such violation was a confession. In Brown, the Court was primarily concerned with an illegal

arrest followed two hours later by a confession to the arresting officer and several hours later by another statement to an Assistant State Attorney. Both statements were preceded by adequate Miranda warnings. The Court's principal holding was that the initial statement was tainted by the illegal arrest and therefore inadmissible. Its secondary holding, significant to the case at bar, was that the second statement was "clearly the result and fruit of the first." 420 U.S. at 605.² The Court's choice of words and the accompanying footnote are strong evidence that it considers the "fruit of the poisonous tree" doctrine applicable where the "tree," or initial illegality, was an unwarned confession.

Further, the policies delineated by the Brown Court as underlying Wong Sun are closely analogous to those sought to be advanced by Miranda in a Fifth Amendment context. The Court expressed concern that police would be encouraged to make arrests without probable cause for questioning or investigation, knowing that any confession extracted would be admissible at trial by the simple expedient of giving Miranda warnings. Without the sanction of exclusion, the

2. The Court's footnote 12 at this point is instructive in suggesting criteria applicable to the admissibility of one confession given on the heels of another:

The fact that Brown had made one statement, believed by him to be admissible, and his cooperation with the arresting and interrogating officers in the search for Clagett, with his anticipation for leniency, bolstered the pressures for him to give the second, or at least vitiated any incentive on his part to avoid self-incrimination. Cf. Fahy v. Connecticut, 375 U.S. 85 (1963).

Court concluded, "any incentive to avoid Fourth Amendment violations would be eviscerated." 422 U.S. at 602.

Failure to suppress the fruit of unwarned statements would encourage precisely the same evasion of Fifth Amendment guarantees.³ If the police could extract a confession without warnings. Then properly advise the suspect and obtain another statement which would be admissible. There would be little incentive to advise a suspect of his rights until after those rights had been violated. It is unrealistic to think that the mere recitation of the warnings after a statement has been procured illegally is, by itself, a sufficient safeguard of the suspect's right against self-incrimination. There is no logical reason to treat consecutive confessions differently from confessions as the fruit of other illegally obtained evidence or any other kind of derivative evidence. A different conclusion would emasculate the rights guaranteed by the Fifth Amendment.⁴

The Court in Brown in concluding its discussion of the policies underlying the Fourth Amendment, highlights the appli-

3. Pitler, "The Fruit of the Poisonous Tree," Revisited and Shepardized, 56 Cal.L.Rev. 579 (1968); Ruffin, Out on a Limb of the Poisonous Tree: The Tainted Witness, 15 U.C.L.A.L.Rev. 32 (1967); Comment, Scope of the Taint Under the Exclusionary Rule of the Fifth Amendment Privilege Against Self-Incrimination, 114 U.Pa.L.Rev. 570 (1966).

4. See, Pitler, supra, at 613-620.

cability to a Fifth Amendment situation when it notes that the Miranda warnings "cannot assure in every case that the Fourth Amendment violation has not been unduly exploited" significantly citing Westover v. United States, 384 U.S. 436, 496-497 (1966), a companion case to Miranda. Westover, however, dealt not with an initial Fourth Amendment violation, but with an initial period of interrogation without any warnings of the right against self-incrimination, followed by a confession after adequate warnings.

The application of the "fruit of the poisonous tree" doctrine to successive admissions or confessions does not, of course, imply the imposition of a per se rule, which would void every confession made after the "cat is out of the bag" by way of admissions induced without proper warnings.⁵ Rather, it requires a judicial resolution of whether:

. . . granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.

(Wong Sun, supra, 371 U.S. at 488).

RELEVANT FACTORS AND THEIR APPLICABILITY TO THE INSTANT CASE

Acknowledging the necessity for case by case analysis, the Court in Brown went on to set forth factors relevant to a

5. Indeed, this Court rejected such an approach in Tanner v. Vincent, 541 F.2d 932 (2d Cir. 1976), cert. denied, ___ U.S. ___ (1977). In that case, although the Court did not specifically employ "fruit of the poisonous tree" analysis, it spoke of the lack of causal connection between the first and second confessions and deferred consideration "whether on different facts the exclusion of a second confession might be required in order to deter avoidance of Miranda in obtaining the first." 541 F.2d at 937, n.5.

determination of whether there had been undue exploitation. Specifically enumerated were: (1) the giving of Miranda warnings; (2) the temporal proximity of the primary illegality (an unlawful arrest in that case) and the confession; (3) the presence of intervening circumstances; and particularly, (4) the purpose and flagrancy of the official misconduct. The Court noted that the voluntariness of the statement is a threshold requirement to its admissibility. If the confession is involuntary under traditional analysis, then it would, of course, be suppressed in any case and it would not be necessary to reach this analysis.

Thus, the focus of the inquiry is primarily on the conduct of the police. Deterrence of unconstitutional police conduct and the extent to which that goal will be served by exclusion of the confession is the linchpin of analysis under Wong Sun, Tucker, Brown and their progeny rather than the reliability of the derivative evidence, be it physical or verbal.

A review of the facts in the instant case indicates that Jennings' confession was a result of direct exploitation of his previous day's statements, extracted without any of the Miranda warnings. The giving of those warnings prior to interrogation on August 27 was, standing alone, insufficient to render the subsequent confession admissible. A more thorough review of the facts in this case measured against the criteria set forth above shows that the taint of the primary

illegality was not purged.

Temporal Proximity of the Unwarned Admissions and
the Confession

Detective Halverson concluded his first day of questioning appellant at approximately 4:30 p.m. and returned the next morning at 10:40 a.m. Jennings' confession was extracted by noon. Few cases have turned exclusively on the issue of temporal proximity. Yet the case law clearly indicates that close proximity, as here, is a substantial factor in evaluating the impact of the other factors.

In Wong Sun, the suppressed statement of Toy and the admissible statement of Wong Sun were at temporal extremes. Toy's statement came immediately in the wake of the illegal break-in, whereas Wong Sun's was not given until several days after the illegal arrest and only after he had been released on recognizance and returned voluntarily to speak with the officers. In United States v. Bayer, 331 U.S. 532 (1947), the Supreme Court refused to suppress a properly warned confession claimed to be tainted by an inadmissible confession made six months earlier.

Like the temporal sequence in Brown v. Illinois, the length of time between interrogations in the instant case falls somewhere between the extremes in Wong Sun and Bayer. Although not as coercive as the virtually immediate questioning of Toy on the heels of an illegal intrusion, the mere overnight suspension of interrogation, which continued the following morning, was hardly a passage of time sufficient for Jennings

to consider the ramifications of what he had disclosed in the 4 1/2 hours of interrogation on the first day. Sudden recitation of the Miranda warnings on the morning of August 27 could hardly erase from his mind the statements he had made the day before. The warnings, in themselves, could not restore Jennings to a state of mind in which he perceived his options clearly and accurately. Jennings was given no reason to believe he was starting with a clean slate, which was, in fact, his situation since his previous day's statements were inadmissible. Thus, the time lapse cannot be said to have dissipated the compulsion to speak created by the earlier admissions, or Jennings' belief that he was merely reiterating the already damaging statements.

The Presence of Intervening Circumstances

The Supreme Court in Brown spoke of a break in the causal chain between the primary illegality and the evidence sought to be suppressed. The intervening circumstances in Wong Sun itself are the most notable example of occurrences which effectively purged the taint of the illegal arrest. Wong Sun had been arraigned, released on recognizance and returned voluntarily several days after the arrest to make his confession. Courts have recognized a number of other intervening factors which represent a dramatic break in the chain of events.

In Collins v. Beto, 348 F.2d 823, at 828 (5th Cir. 1965), Chief Judge Tuttle noted that access to counsel would have been a strong factor in purging the taint of an illegal arrest

which ultimately led to a confession. In Johnson v. Louisiana, 406 U.S. 356, 365 (1972), formal arraignment and the assistance of counsel at a line-up were held to break the causal chain between an illegal arrest and an identification resulting from the line-up, which appellant sought to suppress.

In United States v. Mullens, 536 F.2d 997 (2d Cir. 1976), this Court held that the taint of an illegal search was purged by appellant's spontaneous decision to come to the police precinct and confess. The Court emphasized that his decision was made outside the potentially coercive atmosphere of the police precinct.

In Westover v. United States, supra, the Supreme Court while suppressing a confession to federal authorities after hours of interrogation by local authorities, noted that "a different case would be presented if an accused were taken into custody by the second authority, removed both in time and place from his original surroundings, and then adequately advised of his rights and given an opportunity to exercise them." 384 U.S. at 496.

Another intervening factor, absent in the instant case, which might have helped to purge the primary taint, would have been advice that the first day's admissions were taken illegally and could not be used against Jennings. See, Fisher v. Scafati, 439 F.2d 307, 311 (1st Cir.), vacated on other grounds, 403 U.S. 939 (1971).⁶

6. It is not appellant's position that such a warning is required to purge the taint, see, Tanner v. Vincent, supra, at 936, but that advice as to the legal status of the prior day's questioning and statements could have helped to dissipate the coercive impact of the primary illegality. The absence of such advice is one of the relevant factors to be considered.

None of these factors -- a release from custody, access to counsel, a change in the setting of questioning, a different interrogating agency, or advice as to the legal effect of the previous illegality -- were present in the instant case. Instead, Jennings remained in custody in Suffolk County Jail, without recourse to counsel, family or friends. Although he had court-appointed counsel on the charges pending against him, he had no opportunity to consult with his attorney in the brief interval between the first and second periods of interrogation. He was interrogated in the same place by the same detectives who had questioned him for 4 1/2 hours, less than 20 hours previously, and to whom he had made extensive admissions. He received no advice on the consequences of his former statements, which might have helped to restore him to a state of mind where he could intelligently consider the protections afforded against self-incrimination and determine whether he wanted to waive his rights. In essence, nothing happened between August 26 at 4:30 p.m. and August 27 at 10:40 a.m. to wither the effects of the first day's interrogation on Jennings. He was in a situation from which there was no foreseeable support or relief.

On the other hand, Detective Halverson had moved dramatically, using the intervening evening to exploit what he had improperly learned from Jennings during the day.

Purpose and Flagrancy of the Official Misconduct

With knowledge that appellant was represented by counsel on pending charges, Detective Halverson interrogated Jennings, then in custody in Suffolk County Jail, without any of the prescribed warnings required by Miranda. This was a clear violation of the law as set forth in Miranda and Mathis v. United States, supra, both decided well in advance of the date of the interrogation. Halverson's failure to warn then can hardly be characterized as inadvertent and is in sharp contrast with the police conduct in Michigan v. Tucker, supra, and Tanner v. Vincent, supra, where there was substantial compliance with the procedural safeguards required by Miranda in advance of any questioning. Indeed, in Tucker, the Supreme Court found that the warnings given accorded with then existing law and "considered it significant to our decision that the officers' failure to advise respondent of his right to appointed counsel occurred prior to the decision in Miranda." 417 U.S. at 447. Similarly, in Tanner v. Vincent, supra, this Court noted that the warnings found to be incorrect by the state court on one small point, were adequate under the law of this Circuit. 541 F.2d at 934, n.1.⁷

7. Tanner had been advised that he had a right to remain silent; that any statements he made could be used against him in criminal proceedings; that he had a right to an attorney at every stage of the proceedings and that if he could not afford to hire a lawyer there would be one appointed for him. The state court, however, held that these warnings did not adequately apprise Tanner of his right to be represented by counsel during the interrogation at his apartment immediately subsequent to the arrest.

Here the lack of any warnings was compounded by deceptive questioning intended to induce Jennings to drop his guard, precisely the kind of conduct the Fifth Amendment guarantees should bar. Halverson spent the morning apprising Jennings of his belief that a review of the information in the files indicated Jennings' guilt on at least one of the pending rape charges, suggesting further specific similarities between the charges pending and the case under investigation.⁸ He then proceeded to discuss Jennings' sexual problems, carefully avoiding reference to the Carman case on which he had actually

8. Halverson's questioning of Jennings about his pending rape charges was in wanton disregard of clearly established principles of New York law. In People v. Arthur, 22 N.Y.2d 325, 329 (1968), the New York State Court of Appeals reaffirmed explicitly what had long been the law of the state:

Once an attorney enters the proceeding, the police may not question the defendant in the absence of counsel unless there is an affirmative waiver, in the presence of the attorney, of the defendant's right to counsel. There is no requirement that the attorney or the defendant request the police to respect this right of the defendant.

That holding has been frequently reaffirmed as a bedrock principle of the right to counsel under the New York Constitution. See, e.g., People v. Hobson, 39 N.Y.2d 479 (1976).

The Supreme Court has also held a defendant's Sixth Amendment right to counsel to be breached by police questioning after he has been indicted and is represented by counsel. Masiah v. United States, 377 U.S. 201 (1964); or simply where he is clearly represented by counsel after the initiation of judicial proceedings against him. Brewer v. Williams, 97 S.Ct. 1232 (1977).

The flagrant impropriety of Halverson's conduct is thus clear. He acknowledged that he assumed Jennings was represented by counsel, but made absolutely no effort to contact counsel. It is certain that Halverson was not anxious for Jennings to have the opportunity to consult with his attorney. In this instance, though he did not use any statements elicited concerning the pending charges, his very questioning on those matters was improper and evidence of his bad faith.

(Footnote continued on next page)

come to question appellant. Only in the afternoon did he elicit Jennings' knowledge of the Carman death and the tale of the friend from the city who had killed her. Expressing incredulity that Jennings would have made no inquiries of his friend concerning the details of the killing, Halverson was able to induce Jennings to provide a general description of the friend and an explanation of Jennings' whereabouts on the night of Mary Carman's death.

An analysis of Halverson's conduct of the interrogation suggests that knowing Jennings was represented by counsel on the pending charges, he nevertheless intended to ferret out possible incriminating admissions without alerting Jennings through the Miranda warnings of the peril inherent in his situation and risking the chance that the suspect would refuse to speak with him. The purposefulness of Halverson's actions is further exemplified by his assiduous avoidance of discussion of the Carman death until he had exhibited a concern for Jennings' "sexual problems" and family life, which served as a wedge to dissolve Jennings' caution and create an atmosphere of trust.

The guileful questioning and clearly established failure to give any of the unequivocally required warnings on the morning of August 26 did not, however, mark an end to police impropriety. The admissions so procured became the predicate for a night-time investigation which fully exploited the

(Footnote continued from last page) . . .

Further, this questioning was directly employed by Halverson to break down Jennings' resistance and thus led directly to Jennings' admission that he had knowledge concerning the death of Mary Carman, but had been afraid to come forward because of his rape arrests and the suspicion likely to be focused on him.

ill-gotten gains and led directly to the following day's confession.

Detective Halverson's immediate response upon leaving Jennings was to initiate an investigation, the results of which led him back to Suffolk County Jail the next morning, secure, this time, that he could induce a confession in compliance with Miranda. Through questioning of Jennings' family and girl friend, he concluded that the suspect's vaguely described "friend from the city" was non-existent and that his alibi for the night in question was without substance. This, of course, was information uncovered as a direct result of Jennings' admissions and was to be used effectively the following morning in procuring the desired confession.

Further, when the Miranda warnings were given the following morning, Jennings' response provides dramatic evidence that his subsequent statements were directly linked to the illegal interrogation of the previous day. Under the coercive influence of his own prior admissions, he quickly responded, "My friend did it and I'll speak to you about it. I have nothing to hide."

The detectives then led him through his previous day's story, eliciting a far more detailed account of the killing, still attributed to "the friend," but holding in reserve their trump cards -- the discrediting information garnered in the previous night's fruitful follow-up of Jennings' initial ad-

missions. Only when he was finally confronted with his girl friend's disavowal of his alibi and the denial by his family of any knowledge of a friend from the city did he become agitated, and when told to calm down by the detective, whom he had been led to trust, he confessed.

In no case where the primary illegality was so blatant and the police conduct in conjunction with it so contrived, has a court permitted use of derivative evidence. On the contrary courts, have stressed the significance of such purposeful illegality as the primary basis for excluding evidence so obtained.

In Brown v. Illinois, supra, the Court's analysis on this point is equally applicable to the case at bar:

The illegality here, moreover, had a quality of purposefulness. The impropriety of the arrest was obvious; awareness of that fact was virtually conceded by the two detectives when they repeatedly acknowledged, in their testimony, that the purpose of their action was "for investigation" or for questioning The arrest, both in design and in execution, was investigatory. The detectives embarked upon this expedition for evidence in the hope that something might turn up.

(420 U.S. at 605)⁹

The parallels are obvious from the foregoing recitation of Halverson's utter disregard of Fifth Amendment guarantees, guileful ingratiation of himself, immediate exploitation of the illegally obtained statements and finally Jennings' all too predictable response.

9. See, the Court's analysis of the coercive effect of the first confession on procurement of the second, 420 U.S. at 605, n.12, at p.12, n.2, supra of this brief.

In analagous situations, courts have stressed blatantly illegal police conduct as a basis for suppressing derivative evidence. In United States v. Edmonds, 432 F.2d 577 (2d Cir. 1970), this Court held in-court identifications inadmissible as "fruit of the poisonous tree" when they resulted from line-ups following arrests made without probable cause simply for the purpose of permitting witnesses to view the suspects.¹⁰ Similarly, the Third Circuit Court of Appeals in United States ex rel. Gockley v. Myers, 450 F.2d 232 (3rd Cir. 1971), cert. denied, 404 U.S. 1063 (1972), suppressed a confession made after adequate Miranda warnings, where the petitioner had been arrested without probable cause for forgery, when the true purpose of the police was to question him about the murder to which he ultimately confessed.

In two recent decision, where the initial illegality was not so flagrant, this Court has looked to the nature of the subsequent exploitation, in suppressing derivative evidence. In United States v. Karathanos, 531 F.2d 26 (2d Cir.), cert. denied, 428 U.S. 910 (1976), a search warrant secured without probable cause led to the discovery of illegal aliens on defendant's premises. The Government argued tht only the direct evidence secured -- the testimony of agents as to the

10. In Collins v. Beto, supra, Judge Friendly's concurring opinion discussed the wantonness of police illegality as a significant factor in the determining the length of Wong Sun's reach:

On this view, a flagrantly unlawful violation by the police would require depriving them of every foreseeable benefit that might spur further adventures of the same kind, certainly suppression of all evidence acquired, including confessions given prior to release or in the absence of a lawyer.

aliens' presence on the premises -- should be suppressed. This Court, however ruled that the trial testimony of the illegal aliens themselves should be suppressed as tainted fruit. Applying the principles of Wong Sun and Brown, the Court noted that the Government had exercised considerable leverage in procuring the testimony, by promising to allow the illegal alien witnesses voluntarily to depart without prosecution. Hence the decisions of the aliens to testify could not be characterized as "intervening 'acts of free will' of sufficient independence 'to purge the primary taint of the unlawful invasion.'" 531 F.2d at 35. Application of the exclusionary rule was deemed appropriate since the aliens' testimony was a reasonably foreseeable consequence of the illegal search and similar future searches would be encouraged by admitting the testimony.

In United States v. Ceccolini, 542 F.2d 136 (2d Cir. 1976), this Court again suppressed the testimony of a witness discovered as a result of an illegal search. The controlling factor here, however, was not the use of coercion to gain the witness's testimony, which the Court assumed to be absent for the purposes of decision. Instead the Court said: "In this case, the government agent exploited the illegally obtained information by seeking out Lois Hennessy and asking questions directly related to the illegal search." 542 F.2d at 142, n.9. The analogy to Halverson's night-time investigation using what he had illegally gathered from Jennings during the day is compelling.

In the instant case, there was an obvious violation of Miranda, a total failure to give any warnings, which cannot be characterized as inadvertent, as were the incomplete warnings in Michigan v. Tucker, and Tanner v. Vincent. This was followed by a thoroughgoing and intentional exploitation, first to procure damaging admissions and then to unearth information derived from those admissions to compel a confession. At this point, as Halverson well must have known, the warnings could not effectively perform the prophylactic function of safeguarding Jennings' right against self-incrimination.

Thus, this Court can hold Jennings' confession admissible only by adopting a per se rule that the recitation of Miranda warnings alone is sufficient to purge the taint of an earlier illegal interrogation, regardless of temporal proximity, the lack of intervening events or the flagrancy of police illegality and exploitation. The Supreme Court has already rejected such a per se approach in Brown v. Illinois.

SUCCESSIVE CONFESSIONS

Since United States v. Bayer, supra and Westover v. United States, supra, it has been clearly established that custodial interrogation conducted without advice to a suspect substantially informing him of his right against self-incrimination will preclude the use of a subsequently procured confession unless there are intervening circumstances which vitiate the coercive impact of the initial illegal

interrogation. Addressing the impact of illegal interrogation or illegally obtained statements on a subsequent confession, procured after proper warnings, courts have employed different terminology. Although not always employing the "fruit of the poisonous tree", language,¹¹ in all instances, courts have analyzed essentially the same factors outlined in Brown v. Illinois, in determining admissibility of the challenged confession and, in all of the cases found, one or more of those factors have proved determinative.

11. Three Circuit Courts have recently raised a question as to whether Wong Sun provides the proper structure for analysis of the admissibility of derivative evidence of a Fifth Amendment violation. In Null v. Wainwright, 508 F.2d 340 (5th Cir. 1975), the Fifth Circuit assumed without deciding that the fruits of statements procured without Miranda's preventive measures are generally inadmissible. The Court held, however, that the introduction of the derivative evidence in that case constituted harmless error.

In United States ex rel. Hudson v. Cannon, 529 F.2d 890 (7th Cir. 1976), two members of the court, other than the opinion writer, concluded in dictum that where an interrogation occurs in the absence of Miranda warnings, the deterrent effect of excluding third party testimonial fruits of an otherwise voluntary statement is not sufficient to warrant exclusion. Aside from its limited precedential value as dictum, unnecessary to the Court's holding, this conclusion does not purport to cover the situation where the fruit of an unwarned statement is a subsequent confession by the defendant him or herself.

Most recently in United States v. Lemon, 550 F.2d 467 (9th Cir. 1977), the Ninth Circuit avoided the issue, holding
(Footnote continued on next page)

Confessions Held Admissible

Analysis of cases which have held confessions admissible demonstrates the presence of one of the factors outlined in Brown, which tend to dis taint.

In United States v. Bayer, supra, a six month interval between an initial confession, assumed inadmissible, and a later confession after proper warnings, was held admissible. Decided before Wong Sun had clearly held the "fruit of the poisonous tree" doctrine applicable to statements procured through initial illegality, the Court eschewed that terminology. But it clearly rested its decision on the lengthy time interval and the defendant's relatively unrestricted movement throughout the six-month hiatus in which he was not questioned, factors obviously central to the determination that Wong Sun's confession similarly need not be suppressed.

In United States v. Knight, 395 F.2d 971 (2d Cir. 1968), cert. denied, 395 U.S. 930 (1969), this Court spoke of "taint" and the causal relationship between questioning of defendant by local police in his home and a confession after adequate warnings by an FBI agent, called to defendant's apartment by the local police. The Court found any taint of the initial questioning

(footnote continued from last page). . .

that a verbal consent to search was non-testimonial and therefore Miranda did not apply.

In light of the strong language in footnote 12 of the Brown opinion and its accompanying text, and Justice White's dissent from denial of certiorari in Fitzpatrick v. New York, 414 U.S. 1050, 1051 (1973), it would appear as urged earlier, that the Wong Sun analysis is appropriate. However, the issue may, in fact, be more academic, than of practical importance. The cases set forth in the accompanying text establish that, however designated, the ultimate considerations are the same.

dissipated. Significantly, the questioning took place in October, 1965, before the Miranda decision had been handed down, a factor found significant by the Supreme Court in Michigan v. Tucker.

Further, the Court doubted whether the brief questioning at defendant's home constituted custodial interrogation, within the meaning of Miranda. The Court reasoned that the degree of coercion in such circumstances was minimal. The FBI agent's request that Knight's handcuffs be removed was found to accent the lack of a coercive atmosphere and to break any causal relationship between arguably unconstitutional conduct by local authorities and Knight's confession to the FBI agent.

In Tanner v. Vincent, supra, the crucial factor in this Court's analysis was the substantial compliance by the arresting police with the required Miranda warnings. The initial warnings, found wanting by the state court, were considered adequate under the law of this Circuit and thus hardly an indication of flagrant police misconduct. The Court reasoned that the deterrent purposes of the exclusionary rule would hardly be served in a situation where police error was minimal and inadvertent.

Distillation of the factors employed by the courts in these three cases demonstrates application of the factors set forth in Brown. Confessions were found admissible in these three cases, because of a lengthy interval between periods of questioning, intervening circumstances which tended to discharge a coercive atmosphere or a finding that the initial police illegality was inadvertent and lacking the purposefulness which

application of the exclusionary rule is intended to discourage.

Suppressed Confessions

A line of cases beginning with Westover v. United States, supra, a companion case to Miranda, have examined circumstances in which a suspect was questioned by local law enforcement authorities with inadequate or no warnings and then by federal agents who gave the required warnings and procured a confession. In Westover, itself the defendant had been interrogated for several hours by local authorities without warnings before the FBI was called. FBI agents properly advised Westover of his rights but continued to question him in the same precinct of the Kansas City Police Department and eventually procured confessions. In suppressing the confession, the Court focused on Westover's continued custody in the same compelling surrounding, noting that had there been intervening circumstances such as a removal in time and place from the initial situation, with adequate warnings and an opportunity to exercise judgment, a different result might have ensued.

In Evans v. United States, 375 F.2d 355 (8th Cir. 1967), cert. denied sub nom, Bruton v. United States, 397 U.S. 1014 (1970), the Court dealt with essentially the same factual pattern of local custody and a sequence of local, then federal interrogation. The Eighth Circuit used explicit Wong Sun language and analysis in holding a subsequent confession after adequate warnings to be "tainted and infected by the poison of the prior, concededly unconstitutional confession."

375 F.2d at 361. Evans remained in custody at the same local jail throughout interrogation by agents of both agencies. His confession to the federal officer after adequate warning was made in the presence of the local police official to whom he had confessed without the requisite warnings. The Court found that the local detective's continued presence and the unchanged surroundings militated against any finding of sufficient intervening circumstances to erase the taint.¹²

In Harney v. United States, supra, and Fisher v. Scafati, supra, the Fifth and First Circuits analyzed successive confessions in "fruit of the poisonous tree" language and emphasized police exploitation of in-custody exculpatory statements made without warnings.

In Harney, which also deals with the local-federal fact pattern and employs "intervening circumstances" analysis, there was the added factor of exploitation by the police of statements made while in local custody before any confession had been extracted. In custody under suspicion of having stolen a car, and without adequate warnings, Harney gave the police an exculpatory account of how he had acquired the car, providing the name of the dealer from whom it had been purchased. The interrogating detective made inquiries by telephone, which discredited Harney's story. He then confronted Harney with this

12. In United States v. Pierce, 397 F.2d 128 (4th Cir. 1968) and Harney v. United States, 407 F.2d 586 (5th Cir. 1969), the same local-federal sequence of questioning occurred. In both cases interrogation continued in the same surroundings and the federal authorities were the beneficiaries of the pressure applied by the local in-custody interrogation. In neither case did the court find intervening circumstances sufficient to break the causal link and permit a reasoned decision by the suspect to respond under circumstances which could render such decision voluntary.

information immediately after which Harney confessed for the first time. The effects of this oral confession, later committed to writing, were found not to have been sufficiently dissipated to permit admission of the later confession to the FBI after proper warnings.¹³

Thus, these cases which have held the subsequent confession inadmissible have found a causal chain between the illegal interrogation and the ultimately challenged confession, and have found intervening factors insufficient to break such a link. In Harney and Fisher, cases most analogous to the case at bar, the Courts thoroughly explored police exploitation of statements made without warnings to protect the right against self-incrimination, and weighed such purposeful activity in suppressing confessions ultimately extracted, at least, in part as a result of such conduct.

The "fruit of the poisonous tree" analysis outlined in Brown v. Illinois provides a structured framework in which to analyze the appropriateness of applying the exclusionary rule. The cases discussed in this final section demonstrate that the same factors are employed, even where that terminology is not itself used. Applying those factors to the instant case, it is clear that Jennings' confession must be suppressed. Aside

13. Fisher v. Scafati also involved flagrant exploitation of information procured from petitioner without warnings. Fisher, under custodial interrogation, attributed scratches on his neck and back to a girlfriend, whose name he gave the police and denied having borrowed a car at a party at which he had been present with the deceased on the night of her disappearance. The police exploited both of those illegally procured statements by investigating and confronting Fisher with their conclusion that he was lying. The Court found a direct causal link between these statements and his ultimate confession.

from the mere recitation of the Miranda warning, there is not a single occurrence to vitiate the impact of the first day's illegal interrogation and the intervening exploitation of Jennings' admissions. The judgment of the District Court should be reversed.

CONCLUSION

FOR THE REASONS STATED ABOVE, THE
ORDER OF THE DISTRICT COURT SHOULD
BE REVERSED AND THE WRIT GRANTED.

Respectfully submitted,

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August 19, 1977

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

KENNETH E. DEMARIO, being duly sworn, deposes and says:

I am not a party to the action and am over 18 years
of age.

On August 19, 1977, I served two copies of the within
Appellant's Brief and Appendix in the case of FREDERIC D.
JENNINGS v. J. LELAND CASSCLES, Docket No. 77-2064 upon the
Hon. Louis J. Lefkowitz, Attorney General of the State of New
York at 2 World Trade Center, New York, New York 10047 by
depositing two true copies of same enclosed in a post-paid
properly addressed wrapper, in an official depository under
the exclusive care and custody of the United States Postal
Service within the State of New York.

Kenneth E. Demario
KENNETH D. DEMARIO

Sworn to before me this
19th day of August, 1977.

Susan N. Herman
NOTARY PUBLIC

SUSAN N.
Notary Public, State of New York
No. 31-4640164
Qualified in New York County
Commission Expires March 1979